BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

THE RULES AND REGULATIONS FOR GOVERNMENT-OPERATED CAMPS (Appendix C) AND SELECTIVE SERVICE ORDER NO. 111 (Appendix B) ARE VOID BECAUSE OUTSIDE OF ANY POWER WHICH CONGRESS DELEGATED OR PURPORTED OR ATTEMPTED TO DELEGATE BY SECTION 5 (g) OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940 OR BY ANY OTHER PART OF SAID ACT.

THE ACT.

The Selective Training and Service Act of (Sept. 16) 1940 will be referred to simply as the "Act." The section references will be those of the USCA Title 50.

The Act begins (Sec. 301) with a declaration of its purpose as follows:

> "(a) The Congress hereby declares that it is imperative to *increase and train the personnel of the armed forces* of the United States.
>
> (b) The Congress further declares that in a free society the *obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service.*" (Italics supplied.)

Section 302 carefully defines the obligation of "Registration of male citizens and alien residents; age limitations."

Section 303 contains a page and a half (fine print) of definitions, guides and standards relative to "Persons liable for training and service; number; term; status after completion of term; pay; allowances; and benefits; place of employment."

Section 304 provides the guides and standards in regard to the "Manner of selecting men for training and service; quotas."

Section 305, in three and one-half pages (fine print), provides definitions, guides and standards in regard to "Exceptions, exemptions, or deferments from training and service." Herein Congress very carefully defined and provided guides and standards for determining exemptions and deferments and for the continuance or termination of deferments and then, in subsection (g), provided, very specifically, the procedure for determination of the genuineness of a claim for exemption by reason of conscientious objection. When the procedure has been followed and, according to that procedure, the governmental agency has determined that the registrant is conscientiously opposed to even non-combatant military service, then "Nothing in this Act shall be construed to require" such service and the registrant shall "in lieu of such induction, be assigned to work of national importance under civilian direction." Neither this section nor any other part of the Act contains another word as to what shall be done with such registrant after such determination of his status.

Section 310 sets up the administrative agency—the machinery—for carrying out the provisions of the Act but it (that section) is wholly devoid of guides or standards for the functioning of that agency.

Under section 310 the President has set up the Selective Service System. That System has established camps, assigned to the camps those registrants who have been found, by the procedures provided by the Act, to be exempt from all military service, and promulgated a complete code of laws for the government, during every hour of the day and night, of the conduct of those assignees.

The Act is devoid of guides or standards for the functioning of the agency—machinery—relative to registrants to be assigned in lieu of induction, to work of national importance under civilian direction. *It contains not a word of referring, directly or indirectly, to confinement or detention of conscientious objectors* who have been found exempt from induction. Not a word indicating any intention of Congress that they should be restricted in their liberties in any manner beyond the requirement to perform work of national importance under civilian direction.

THE LAW.

Even prior to the recent decision in *Ex Parte Endo,* 65 S. Ct. 208, to which we shall refer later, two decisions of this Court clearly showed the invalidity of the claimed or attempted delegation of authority in the instant case. They are *A. L. A. Schechter Poultry Corp. et al. vs. United States,* 295 U.S. 495-555, and *Yakus vs. United States,* 321 U.S. 414.

The *Schechter* case involved a conviction for violation of the "Live Poultry Code" promulgated by the President under authority attempted to be delegated to him under and by the National Industrial Recovery Act of June 16, 1933. That act began with a declaration of national emergency as follows:

> "Sec. 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people is hereby declared to exist." (Followed by a long, detailed and specific statement of the objects and purposes for which the act was passed.)

The act set up complete machinery for promulgation of codes by the President to carry out the expressed purposes and accomplish the expressed objects of the act. The code was attacked on the ground of unconstitutional delegation of legislative authority. This court sustained the attack, saying at page 528:

> "We are told that the provision of the statute authorizing the adoption of the codes must be veiwed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. *Extraordinary conditions do not create or enlarge constitutional power.* (Citing Ex Parte Milligan.) The Constitution established a

national government with powers deemed adequate, as they proved to be *both in war and peace,* but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary." (Italics supplied.)

After stating that under Art. 1 sec. 1 of the Constitution "all legislative powers herein granted shall be vested in a Congress of the United States," this Court proceeds (page 529):

> "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the National Legislature cannot deal directly. We pointed out in the Panama Refining Co. case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicability, which will enable it to perform *its function in laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them,* CANNOT BE ALLOWED TO OBSCURE THE LIMITATIONS OF THE AUTHORITY TO DELEGATE, IF OUR CONSTITUTIONAL SYSTEM IS TO BE MAINTAINED." (Emphasis supplied.)

Summarizing its discussion of the subject of delegation of legislative authority, this Court said, at page 541:

> "§ 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact deter-

> mined by appropriate administrative procedure. *Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, sec. 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in sec. 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President, in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code making authority thus conferred is an unconstitutional delegation of legislative power.*" (Emphasis supplied.)

In *Yakus vs. United States, supra*, the price regulations promulgated by the Office of Price Administration, established by the President under the Emergency Price Control Act, were claimed to be invalid because not within constitutionally delegated powers. The *Schechter* case was distinguished but nowhere questioned the validity of the decision or of the reasoning on which it was based. It is a recognition that the *Schechter* case is still the law. In regard to that case the Court in the *Yakus* case, said at page 424:

> "The Act is unlike the National Industrial Recovery Act of June 16, 1933, considered in A.L.A. Schechter Poultry Corp. vs. United States (citing reports which proclaimed in the broadest terms its purpose 'to rehabilitate industry and to conserve natural resources.' *It prescribed no method of attaining that end save by the establishment of codes* of fair competition, *the nature of whose permissible provisions was left undefined. It provided no standards to which those codes were to conform.*" (Emphasis supplied.)

This Court pointed out that the Act itself expressed ample guides and standards to direct and limit the regulations to be promulgated by the O.P.A. In the early part of the opinion in the paragraph beginning "The standards which are to guide the Administrator's exercise of his au-

thority to fix prices, so far as now relevant, are prescribed in sect. 2,". The Court, at length, recites the standards enumerated in that section. In addition to these specified standards, the Price Control Act contained a long and detailed statement (set forth in the opinion immediately preceding the paragraph last referred to) of the objects and purposes of the Act which, taken together with the standards specified in section 2 constitute a quite complete code for the guidance and government of the O.P.A. The Court further points out that the Price Control Act was passed during the present war (January 30, 1942) and that it is expressly an exercise of the war power of Congress, section 1 declaring that the Act is passed "in the interest of the national defense and security and necessary to the effective prosecution of the present war."

Notwithstanding that the Price Control Act was an express exercise of the war power of Congress this Court bases its finding of validity of the regulations on the fact that the Act does provide guides and standards for the direction and limitation of the O.P.A., in the making of its regulations. It recognizes that had those guides and standards been absent, as they were in the *Schechter* case, the regulations would have been invalid because outside of constitutionally delegated power.

Three things are, therefore, necessary to the validity of codes or regulations promulgated by an administrative agency set up by the Congress. First, the act must state its objects and purposes; second, the agency must be set up to do the administrative work to effectuate such stated purposes; third, guides and standards must be provided in the act for the direction and limitation of the agency in its efforts to effectuate those purposes.

The expressed purposes of the Selective Training and Service Act are to "increase and train the personnel of the armed forces" and to "provide a fair and just system of selective compulsory military training and service," as declared in subsections (a) and (b) of the first section (50 USCA 301).

The Act sets up the Selective Service System to effec-

tuate these declared purposes. It provides guides and standards for the conduct of that agency in carrying out the declared purposes of the Act, namely in the selection of those who are to be inducted, those who are to be deferred and those who are to be exempt from induction. As to conscientious objectors found, by and in accordance with the detailed and carefully guarded prescribed procedures, to be exempt from induction—who are, therefore, outside the declared purposes of the Act—it says only that they shall be assigned to work of national importance under civilian direction.

There is no word or intimation in the Act in the nature of guides or standards for the direction or limitation of the agency which is to do the assigning nor is there a word in the Act regarding the regulation or control of the work nor regarding the governing or controlling of the men on or during the work. There is no intimation anywhere that Congress ever had in mind any regulation or control of these men outside of their working time.

We turn now to the decision of this Court in the case of *Ex Parte Endo,* 65 S. Ct. 208, December 18, 1944, which, we submit, decides the case at bar.

That case holds that the Act and Executive Order authorizing the evacuation of those of Japanese ancestry, from the west coast military area, may have been valid but that the Act and Order were silent as to detention, after such evacuation, of the citizens thus evacuated and, therefore, the orders of the military and of the Relocation Authority for detention of such persons in relocation centers was without delegated authority and was illegal.

The Selective Training and Service Act was valid as to the selection of those who might be inducted into and thereby increase the personnel of the armed forces (the expressed purpose of the Act) but was wholly silent as to detention (or any other control) of conscientious objectors after they had been found exempt from induction.

We respectfully submit that there was no valid delegation of authority for the detention of petitioner in a Civilian

Public Service camp or for the Rules and Regulations promulgated by the Selective Service System to govern him therein and that, therefore, petitioner was guilty of no crime in violating said Rules and Regulations.

A 2.

SAID RULES AND REGULATIONS AND SAID ORDER NO. 111 ARE VOID BECAUSE THEY PROHIBIT AND PENALIZE THAT FREEDOM OF EXERCISE OF RELIGION PROVIDED FOR BY SAID ACT OF 1940 AND, THEREFORE, ARE CONTRARY TO THE ACT AND CONTRARY TO THE FIRST AMENDMENT OF THE CONSTITUTION AND PARTICULARLY THAT CLAUSE THEREOF WHICH GUARANTEES THE FREE EXERCISE OF RELIGION.

The cases of *Arver vs. United States*, 245 U.S. 366, and *United States vs. McIntosh*, 283 U.S. 605, state that the First Amendment does not give a conscientious objector an absolute right of exemption from military service but the McIntosh decision, at page 623, reads as follows:

> "whether any citizen shall be exempt from serving in the armed forces of the nation in time of war is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides. *That body thus far, has seen fit, by express enactment, to relieve from the obligation of armed service those persons who belong to the class known as conscientious objectors; and this policy is of such long standing that it is thought by some to be beyond the possibility of alteration.*" (Emphasis added.)

The Court then states that Congress does have the *power* to alter this policy but there is no suggestion that the policy, which has become an American tradition, will be or ought to be changed.

The important point is that this Court says that the exemption of conscientious objectors from military service is a long established national policy, recognized by Congress and the courts, *so that when Congress provided, in the Act of 1940, that conscientious objectors shall "in lieu*

of such induction be assigned to work of national importance under civilian direction'' (emphasis added), *it was not only giving expression to and more firmly establishing that long standing national policy, it was substantially broadening that policy.* This clearly appears from the comparison of the Act of 1940 with the 1917 Draft Act.

The obvious purpose of the Act of 1940 was to guarantee freedom of religion (conscience) to those found (according to the tests specifically provided by Congress in section 5 (g) of the Act) to be genuinely conscientiously opposed to participation in either combatant or noncombatant military service.

An act passed in furtherance of an established public policy is always liberally construed in order to effectuate its purpose. It must not be so construed as to defeat its very object. It must not be construed as providing a punishment for the exercise of the very right which the act itself recognizes and purports to confirm or enlarge.

Even a government itself cannot impose an unlawful or unconstitutional condition upon the grant of a privilege.

U. S. vs. Chicago, M. St. P. & P. R. Co., 282 U. S. 311 at 328.

Frost vs. Railroad Commission, 271 U. S. 583, 593, 594.

Hanover Fire Ins. Co. vs. Carr (Harding), 272 U. S. 494, 507, 508.

This being so, obviously an administrative body cannot impose such a condition on the exercise of a right expressly recognized and accorded by Congress, in the law under which such body is created, in accordance with a long standing national policy. This is especially true in this case where the Act is silent in regard to any such condition.

We submit that the Rules and Regulations and Order in question prohibit and penalize the free exercise of religion provided for in the Act and that said Rules and Regulations and Order are contrary to the provisions of the Act and contrary to the First Amendment and are void.

A 3 and 4

The highest monthly "allowance" to any assignee in the camp was $7.50. The "allowance" ran from that down to $3. The average was $3.67 per month. Some were farmed out at $3 per day out of which the assignee received only 50 cents, the government taking the rest (R. 22).

The assignee had no liberty, his services were appropriated by the government, he was compelled to work when, where and at that kind of work dictated by Selective Service. He had committed no crime.

We submit that the Rules and Regulations and Order which placed petitioner under these conditions and restrictions, deprived petitioner of his liberty and his property, took his property (his labor and earnings) for public use without just compensation, all without due process, contrary to the Fifth Amendment and subjected him to involuntary servitude, not as punishment for crime, contrary to the Thirteenth Amendment, and that said Rules and Regulations and Order were void.

B.

If the Selective Training and Service Act be construed as authorizing the Order No. 111 and the Rules and Regulations, then we submit that the portion of the Act so construed would be in violation of the First, Fifth and Thirteenth Amendments and invalid for the reasons given supra, for unconstitutionality of the Order and Rules and Regulations.

C.

The Act says that the objector shall be assigned to work "under civilian direction."

The Selective Service System is commonly spoken of as a civilian organization but this is not true in fact even if claimed to be in form.

The Local Boards and Appeal Boards are composed of civilians and generally serve without pay. The dominating part of the System is composed largely of military men. That is the part which promulgated the Order, Rules and Regulations and directs and controls the camps. The Local

Boards have nothing to do with the camps except to assign to them men whom they classify as 4E.

It is shown beyond question by the Rules for Government-Operated Camps, by the excerpts from the reports of Congressional committee hearings and General Hershey's Report (R. pp. 24-34), by the directions and instructions issued by the Camp Operations Division (R. pp. 21-22) and by the various other exhibits and documents, that the SSS, and particularly the Camp Operations Division, is a militarily controlled and directed organization and not a civilian organization. The Act itself provides, in section 10 (d) (50 U.S.C.A., sec. 310 (d)), that the Chief of Finance of the United States Army shall be "the fiscal, disbursing, and accounting agent of the Director of Selective Service." The head of the SSS is a major-general in the Army and is paid by the Army (R. P. 32). The head of the Camp Operations Division is an army colonel, and signs his orders and directives pertaining to camp matters and conscientious objectors as "Colonel, Field Artillery" (R. P. 23). There are 139 officers, from the armed forces of the United States, in the Washington headquarters of the SSS, from which the camps are controlled and directed (R. P. 34). It clearly appears from Gen. Hershey's Report (R. P. 33) and at numerous other places in the evidence, that the government of the conscientious objectors in the camps is an absolute military regimentation, promulgated and operated by military men and paralleling the regimentation of the army in every detail, so far as possible.

CONCLUSION.

In conclusion we submit that at the time of petitioner's act for which he stands convicted, he was not under civilian direction, as provided by the Act but was illegally detained under military direction contrary to the provisions of the Act; that the Rules and Regulations, for violation of which petitioner was convicted, were and are void because without legislative delegation of authority to promulgate them, because they imposed illegal conditions upon the exercise of a right expressly recognized or granted by Congress and because they violate the First, Fifth and Thirteenth Amendments to the Constitution.

We accordingly submit that a writ of certiorari should issue as prayed in the Petition and that affirming the conviction of petitioner should be reversed.

Respectfully submitted,

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